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EXAMINER

MATZEK, MATTHEW D

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ANN LOUISE MCCORMACK,
RANDALL JAMES PALMER, and
COURTNEY EILEEN SHEA

Appeal 2009-006460
Application 10/646,979
Technology Center 1700

Before MICHAEL P. COLAIANNI, ADRIENE LEPIANE HANLON, and
PETER F. KRATZ, *Administrative Patent Judges*.

COLAIANNI, *Administrative Patent Judge*.

DECISION ON APPEAL¹

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

Appellants appeal under 35 U.S.C. § 134 the final rejection of claims 1 through 27. Claims 28 through 30, the other claims pending in this application, stand withdrawn from consideration by the Examiner. We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6(b).

We REVERSE.

STATEMENT OF THE CASE

The subject matter on appeal is directed to a breathable laminate.

Claim 1 is illustrative:

1. A breathable laminate having a moisture vapor transmission rate of at least about $300 \text{ g/m}^2/24$ hours comprising a nonwoven support layer bonded to an oriented film comprising a letdown resin phase wherein said letdown resin comprises a first ethylene copolymer having a density between 0.900 and 0.915 g/cc and a melt index of no greater than 6 g/ 10 minutes and a carrier resin phase comprising a filler and a different ethylene polymer or copolymer having a density at least about 0.003 g/cc greater than the density of said letdown resin, wherein substantially all of said filler in said oriented film is contained only within discrete regions of said carrier resin phase and thereby separated from contact with said letdown phase, and wherein each of the discrete regions of the carrier resin phase is completely intermixed with and surrounded by the letdown resin phase.

The Examiner maintains the following rejections:

1) Claims 1-5 and 7-27 under 35 U.S.C. § 103(a) over Heyn (US 6,106,956, issued Aug. 22, 2000), Haffner (US 6,045,900, issued Apr. 4, 2000), and Norquist (US 6,447,875 B1, issued Sep. 10, 2002)

2) Claim 6 under 35 U.S.C. § 103(a) over Heyn, Haffner, Norquist, and further in view of Bansal (US 2003/0171054 A1, published Sep. 11, 2003).

REJECTION (1)

ISSUE

Did the Examiner err in determining that the combined teachings of Heyn, Haffner, and Norquist would have rendered obvious a breathable laminate comprising the "substantially all of said filler . . . separated from contact with said letdown phase" feature required by claim 1 within the meaning of § 103? We decide this issue in the affirmative.

PRINCIPLE OF LAW

"[T]he Examiner bears the initial burden, on review of the prior art or on any other ground, of presenting a *prima facie* case of unpatentability." *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992).

FACTUAL FINDINGS AND ANALYSIS

Appellants argue that "a substantial portion of the filler 17 contacts the letdown phase 15 in a film extruded according to Heyn et al., and thus *substantially all of the filler is not separated from contact with the letdown phase* in a film extruded according to Heyn et al." (App. Br. 6).

Specifically, Appellants argue that

the Heyn et al film is produced using a segmented extrusion die wherein the carrier resin is only brought together with the letdown resin as the two constituents are co-extruded side-by-side. Because of this planar, side-by-side interface resulting from this segmented extrusion die, Heyn et al cannot duplicate the structure of Appellant's film.

(App. Br. 4). We agree.

While it appears that the Examiner relies on Heyn to teach the "substantially all of said filler . . . separated from contact with said letdown

phase" feature required by claim 1 (Ans. 9; *see also* Ans. 3 and 4), the Examiner, fails to direct us to any credible evidence or provide any persuasive explanation to show that Heyn teaches the disputed claim feature.

In this regard, while Heyn teaches (Heyn, col. 3, ll. 15-27; *see also* col. 4, ll. 26-40) that the first portion of the extruded precursor film (carrier resin phase) may include a filler material such as calcium carbonate, nowhere does Heyn disclose that substantially all of this filler material is separated from *contact* with the second portion of the extruded precursor film (letdown phase) as required by claim 1.

Moreover, the Examiner does not provide any reason to modify Heyn's first portion of the extruded precursor film (carrier resin phase) to have substantially all of its filler material separated from *contact* with the second portion of the extruded precursor film (letdown phase) as required by claim 1.

Thus, it follows that the Examiner erred in determining that the combined teachings of Heyn, Haffner, and Norquist would have rendered obvious a breathable laminate comprising the "substantially all of said filler . . . separated from contact with said letdown phase" feature required by claim 1 within the meaning of § 103.

Accordingly, for the reasons stated by Appellants in the Briefs and above, we reverse the Examiner's rejection (1).

REJECTION (2)

The Examiner relies on the same factual findings and determinations discussed above to meet the disputed claim feature of independent claim 1 and does not provide any additional findings or determinations as to how

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Bansal would satisfy this disputed claim feature. Therefore, for the reasons stated above, we reverse the Examiner's rejection (2).

DECISION

Accordingly, we reverse rejections (1) and (2).

Accordingly, the Examiner's decision is reversed.

REVERSED

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